JHP & Associates, LLC d/b/a Metta Electric *and* Local No. 1, International Brotherhood of Electrical Workers, AFL–CIO. Case 14–CA–25885

April 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On July 10, 2002, Administrative Law Judge John T. Clark issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

1. The General Counsel requests that the Board reject the Respondent's exceptions because they do not comply with Section 102.46 of the Board's Rules and Regulations. Section 102.46(b)(1) provides, in pertinent part:

> Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

Section 102.46(b)(2) provides that "[a]ny exception which fails to comply with the foregoing requirements may be disregarded." Section 102.46(c) requires, in pertinent part, that "[a]ny brief in support of exceptions shall contain . . . in the order indicated . . . (2) a specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate." The Respondent has submitted as its exceptions a bare list of page and line numbers encompassing almost every page and line of the judge's decision. Thus, the brief does not reference by precise citation the exceptions to which they relate. Clearly, the Respondent's exceptions and brief do not comply with these rules.

In cases where exceptions are defective and a brief is filed, the Board has sometimes exercised its discretion and accepted an otherwise "substantially compliant" brief. See, e.g., *Zurn Nepco*, 316 NLRB 811 fn. 1 (1995) (accepting respondent's substantially compliant brief); compare, *LIR-USA Mfg.*, 306 NLRB 298 fn. 1 (1992) (General Counsel's request for remand denied in light of noncompliant exceptions and brief). Here, the General Counsel asks us to reject the exceptions and brief, and the Respondent does not oppose the request. In light of the Respondent's noncompliance with the Board's Rules, we would be justified in disregarding the documents. However, in the interest of judicial economy, to the extent that the brief has made discernible arguments that cite the record and the law, we have considered those arguments and find no merit in them.[2]

2. We adopt the judge's finding that Steve Tunze violated Section 8(a)(1) of the Act by telling employees, at a mandatory employee meeting on December 9, 1999, that it would "do anything *legally and by any other means* to remain an open shop." (Emphasis added.) We agree that the statement implies that the Respondent is willing to take whatever action is necessary, including engaging in unlawful acts. Thus, we find this case distinguishable from *Aluminum Casting & Equipment Co.*, 328 NLRB 8 (1999), enfd. denied in pertinent part 230 F.3d 286, 295 (7th Cir. 2000). In that case, the Board found unlawful a statement in the employee handbook that the employer intended "to do everything possible to maintain our company's union-free status for the benefit of both our employees and [the Company]." The court reversed, holding that the handbook statement, "drafted long before any organizing campaign was on the horizon," could not reasonably be perceived as indicating a willingness to use unlawful tactics to keep the union out, even in the context of the employer's actual unlawful conduct. In contrast, in the instant case, the threat is clear and unequivocal, reference is made to means other than legal means, and the statement was made in direct response to the employees' nascent union activities.

[1] The Respondent has taken issue with some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Based on the specific facts of this case, we adopt the judge's finding that the Respondent's part owner, Kim Tunze, violated Sec. 8(a)(1) on January 19, 2000, by interrogating job applicant James Coco about his union activities and sympathies.

The Respondent has taken issue with the judge's finding that the Respondent, by Owner Steve Tunze, unlawfully interrogated employee Matt Stewart on October 28, 1999. We need not reach this issue, as any such finding would be cumulative.

Chairman Battista agrees with the judge and his colleagues that the Respondent violated Sec. 8(a)(1) of the Act by asking employees who supported the Union, "Why don't you quit." He would not, however, characterize this statement as a threat of discharge.

[2] Chairman Battista notes that the Respondent does not oppose the General Counsel's request to reject the Respondent's exceptions and brief. Accordingly, Chairman Battista would grant the request. However, he does not oppose his colleagues' disposition of the merits, except as indicated.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, JHP & Associates, LLC d/b/a Metta Electric, St. Charles, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Paula B. Givens, Esq., for the General Counsel.
Lawrence P. Kaplan, Esq., of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in St. Louis, Missouri, on November 27, 2001. The charge was filed January 10, 2000,[1] and an amendment to the complaint was issued November 21, 2001. The complaint alleges that JHP & Associates, LLC d/b/a Metta Electric (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act) by: interrogating and threatening employees, discharging employee Michael P. Thomson, and by making unilateral changes in unit employees' terms and conditions of employment, and failing and refusing to provide requested information to the Union. The General Counsel requests, as part of the remedy, that the certification year be extended.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, with an office and place of business in St. Charles, Missouri, is engaged as an electrical contractor in the building and construction industry. During the 12-month period ending February 28 the Respondent, in conducting its business operations, purchased and received at its St. Charles, Missouri facility goods valued in excess of $50,000 directly from points outside the State of Missouri. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Chronology

The following is primarily based on undisputed testimony and the stipulation of facts, which is attached to the parties' motion to transfer proceedings to the Board. The Board rejected the motion in an unpublished Order [GC Exh. 1(n)], because the stipulation "contains ambiguities that may prevent resolution of the dispute." The stipulation was admitted at the hearing without objection [GC Exh. 1(m)]. The ambiguities have not been relied on, and any specific credibility resolutions, where necessary, have been made.

The Respondent is an electrical contractor employing approximately 12 people. Steve and Kim Tunze are married, joint owners of the Respondent. Steve is director of field operations and Kim its president. During the relevant period Kim ran "the personnel end of it" (Tr. 92). Both are admitted supervisors and agents of the Respondent within the meaning of Section 2(11) and (13) of the Act. Until February 28, 2000, the date that the Union was certified as the representative for the Respondent's bargaining unit employees, the Respondent was a nonunion company. Michael P. Thomson (Thomson Senior), the alleged discriminatee, was the second employee hired by the Tunze's and the most senior employee during the relevant period. His son, Michael J. Thomson (Thomson Junior), was employed by the Respondent since February 1997 as an apprentice electrician. Thomson Junior began discussing unionization with his fellow employees in early September 1999. These discussions generally took place during their lunch break and Thomson Junior specifically recalled having these conversations with employees Matt Stewart and Jason Finnigan.

It was also in this timeframe that the Respondent was evaluating its employees. Thomson Senior was, and had been for several years, the highest paid employee. Before his evaluation, on September 14, 1999, some employees complained to Steve Tunze that they did not believe that Thomson Senior's job performance warranted his wage. Tunze wrote several pages of notes in preparation for Thomson Senior's evaluation interview (GC Exh. 8). Tunze admitted to following his outline during the evaluation. Tunze began the meeting by stating that the purposes were to "determine money issues," review Thomson Senior's performance, explain why job descriptions were established, and what Tunze characterized as "most important" discuss their relationship.

Neither the interview nor the notes are the subject of complaint allegations. They are, however, significant for the light they shed on subsequent events, specifically Thomson Senior's discharge and the reasons given by the Respondent therefor. When Steve Tunze was discussing Thomson Senior's production he said that it "*seems* to be slipping" and that Thomson Senior's current assignment "*seems* to be taking longer than expected." (Emphasis added.) Although Thomson Senior's wage was reduced by $2 an hour, this reduction was done to conform his wage with his current job description, rather than as a result of disciplinary action (Tr. 193–194; Jt. Exh. 2 at 1b). It is significant that Steve Tunze did not place Thomson Senior on probation, did not set any deadlines that had to be met or discharge would be forthcoming, nor in anyway say or indicate, that if improvement was not immediate, discharge would be imminent.

Tunze ended the evaluation by saying that he continued to have confidence in Thomson Senior's ability, that he was a valued employee who was very much a part of the Respondent's plans, and whom the Tunzes wanted to continue to employ.

Thomson Senior was discharged only 2 days after his evaluation. Steve Tunze told him that "it just wasn't working out"

[1] All dates are in 2000 unless otherwise indicated.

(Tr. 193). Tunze told the employees that Thomson Senior was discharged for poor productivity (Tr. 197). In protesting Thomson Senior's claim for unemployment benefits the Respondent added "unsatisfactory job performance" and stated that Thomson Senior was "displeased about change" (the change referred to was his wage reduction), and that he "caused discord among other employees," a statement which was written without further elaboration (GC Exh. 12). Kim Tunze, in her written response to the Board's investigation, added that Thomson Senior was a "very disgruntled employee" who was "going to affect the productivity and moral of all the other employees because of his display of negative actions" (Jt. Exh. 2 at 2).

Between Thomson Senior's evaluation and his discharge, the Tunzes learned that he was a prounion employee who would likely vote for the Union. Employee Matt Stewart conveyed this information to the Tunzes on September 15, 1999. Stewart credibly testified that he was concerned that if a union won an election he would lose his job. Steward told the Tunzes that he thought that five employees would vote for the Union. Stewart credibly testified that Kim Tunze wrote a list of the yes and no votes. In the yes column Stewart told her to list Thomson Senior and Junior, Jason Finnigan, Tom Baird, and Lisa Kicker. Stewart told her to record himself, Dave Crowder, Tom Tevlin, and Tom Homer in the no column. Thus, before Thomson Senior's discharge the potential vote was five to four for the Union. After his discharge the potential vote was tied, which would result in no union. Sometime after Stewart left, but still on the same day, Kim Tunze contacted a labor lawyer. Within weeks of Thomson Senior's discharge the Respondent included in the employees pay envelope literature that, in essence, urged the employees to remain nonunion.

Matt Stewart creditably testified that on October 28, 1999, union organizer, Joe Cousin, visited his jobsite. Shortly after Cousin left, Steve Tunze arrived asking about visitors. Stewart acknowledged that the organizer had been there and Tunze asked what union organizer Cousin said. Tunze left after Stewart answered the question. Stewart and Thomson Junior also creditably testified that on December 9, the Respondent held a mandatory employee meeting. At this meeting Steve Tunze told the employees that the Respondent would do anything legally and by any other means to remain an open shop (Tr. 61, 166).

The Respondent admits that on November 28, 1999, and January 4, 2000, at two different jobsites, Tom Tevlin, its agent, interrogated employees about their union activities. (GC Exh. 1(r).) The Respondent also admits that on January 28, 2000, at its office, Tevlin threatened employees with discharge by suggesting employees should quit because of their union activities and sympathies. (Par. 5(A)(iv) of the complaint, as amended at the hearing, and the stipulation [Tr. 10, 47–48]).

Jeff Coco creditably testified that Kim Tunze interviewed him for a job on January 19, 2000. Coco said that she talked to him about the problems the Respondent was having with the Union and asked if he was aware of those problems. He said yes and she asked how he felt about it. He replied that he wished to stay independent. "She said she also must stay independent." After her husband joined them "they both said, you know, they wanted to stay independent. They were going to fight and do their best to [stay] independent and they won't go Union." (Tr. 12–13.)

The Union was certified as the exclusive bargaining representative on February 28. On March 9 the Respondent announced, and implemented, extensive unilateral changes to the unit employees' existing terms and conditions of employment. The changes affected the employees' wages, sick and vacation days, holidays, insurance, and the use of cellular telephones (GC Exhs. 2, 13.) The Respondent admits that the changes relate to wages, hours, and other terms and conditions of employment of the unit, that the changes are mandatory subjects of bargaining, and that the Respondent did not give prior notice to, nor afford the Union an opportunity to bargain regarding the Respondent's conduct (R. Br. 10). The Union objected to the Respondent's conduct by letter dated March 10.

Butch Hepburn, the union business agent, credibly testified that it was also on March 9 that he requested dates and times from the Respondent, and its attorney, as to when they would be available for bargaining. He did not receive a response and contacted the attorney's office on March 14. He was told that the attorney would probably not be available until March 20. The following day he called the Tunzes, who referred him back to the attorney. Hepburn eventually talked with a member of the law firm and he expressed his desire to immediately begin negotiations because of the unilateral changes made by the Respondent, without bargaining with the certified representative.

The employees, frustrated by the lack of negotiations and the Respondent's unilateral changes, voted to strike on March 13. The strike began on March 15. Thereafter, the Respondent hired strike replacement employees.

The parties met for the first time on March 21 for approximately an 1-1/2 hours. The meeting occurred at the union hall and the parties spent the time discussing the Union's information request (GC Exh. 3). The Union had been told by the Respondent's employees that the Respondent was performing prevailing wage jobs at several area colleges, but that the employees were not receiving prevailing wage rates. Nothing was resolved and the parties agreed to meet on March 30 at the office of Respondent's attorney. In addition to the attorney, Kim Tunze was present and the Union was represented by Business Agents Hepburn and Joe Cousin. The parties again discussed the information request, but the Respondent has never provided the requested information. Kim Tunze testified that at this meeting she gave the Union a proposed collective-bargaining agreement (R. Exh. 1). She admits that although the Union left with the document, there was no discussion of its contents. Union Representative Hepburn testified that he did not recall receiving the document (Tr. 25). On April 5 the Union requested the names, addresses, and telephone numbers of all strike replacement employees (GC Exh. 4). The Respondent has also failed and refused to provide that information.

B. Discussion and Analysis

1. The 8(a)(1) allegations

Paragraph 5 of the complaint contains the 8(a)(1) allegations. The Respondent admits that on November 28, 1999, and January 4, 2000, at two different jobsites, Tom Tevlin, its agent, interrogated employees about their union activities. (GC Exh. 1(r).) The Respondent also admits that on January 28, at its office, Tevlin threatened employees with discharge by suggesting employees should quit because of their union activities and sympathies. (Par. 5(A)(iv) of the complaint, as amended at the hearing, and the stipulation [Tr. 10, 47–48]). I find, as alleged in the complaint, and admitted by the Respondent, that the Respondent violated Section 8(a)(1) of the Act when its agent, Tom Tevlin, on two occasions interrogated employees about their union activities. I also find, as admitted by the Respondent, that it violated Section 8(a)(1) of the Act when its agent, Tom Tevlin, issued an implied threat of discharge by suggesting to employees, who were engaged in protected activities, that they should quit.

Subparagraph 5(B)(i), as amended, relates to Steve Tunze, the Respondent's co-owner and director of field operations, asking employee Stewart about visitors to his jobsite. When Stewart acknowledged that the union organizer had been there, Tunze asked what the union organizer had said. Tunze left after Stewart answered the question. The amendment to the complaint amends the date of this incident from November to October 28, 1999 (GC Exh. 1(s)). The Respondent does not dispute the incident but argues that the incident is not the equivalent of an interrogation. I disagree. I find that under the circumstances Tunze's interrogation of Stewart, who was not a union supporter, open or otherwise, about what the union organizer had said to him reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and thus, violates Section 8(a)(1) of the Act as alleged.

Subparagraph 5(B)(ii), as amended, alleges that on December 9, Steve Tunze threatened employees with unspecified reprisals because of their union activities. Stewart and employee Thomson Junior, creditably testified that on December 9, the Respondent held a mandatory employee meeting. At this meeting Steve Tunze told the employees that the Respondent would do anything legally and by any other means to remain an open shop (Tr. 61, 166). The Respondent has produced no evidence to rebut this testimony. Indeed, Steve Tunze did not deny making the statement when he testified. The statement implies that the Respondent is willing to take whatever action is necessary, including engaging in unlawful acts, to remain a nonunion shop. My remaining findings conclusively demonstrate that the Respondent meant exactly what Tunze, its co-owner, said. I find the statement made by Steve Tunze on December 9, to be an implied threat that reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and thus, violates Section 8(a)(1).

Subparagraph 5(C) alleges that on January 19, 2000, co-owner Kim Tunze interrogated an employee and threatened unspecified reprisals. Jeff Coco creditably testified that during a job interview Kim Tunze talked to him about the problems the Respondent was having with the Union, and asked if he was aware of those problems. He said yes and she asked how he felt about it. He replied that he wished to stay independent. "She said she also must stay independent." After her husband joined them "they both said, you know, they wanted to stay independent. They were going to fight and do their best to [stay] independent and they won't go Union." (Tr. 12–13.) At this point in time the Union was attempting to organize the employees, and the employees had not yet gone on strike. Thus, when Coco answered that he wished to stay independent he was also indicating his understanding that the "problems" to which Tunze referred was the organizing campaign and the "it" was the Union. Job applicants are protected by the Act and it is well-settled that interrogating them about their union sympathies and preferences is inherently coercive. E.g., *M. J. Mechanical Services*, 324 NLRB 812 (1997).

2. The 8(a)(3) allegation

This allegation involves the discharge of Mike P. Thompson, who has been referred to throughout as Thomson Senior. Aside from the Tunzes, the Respondent's co-owners, Thomson Senior was the most senior and highest paid employee. Some employees had complained to Steve Tunze that they did not believe that Thomson Senior's job performance warranted his wage. Tunze apparently agreed, and he wrote several pages of notes in preparation for Thomson Senior's evaluation interview (GC Exh. 8). Neither the interview nor the notes are the subject of complaint allegations. They are, however, significant for the light they shed on subsequent events, specifically Thomson Senior's discharge and the reasons given by the Respondent for the discharge.

Tunze admitted that he followed his notes while conducting the evaluation interview. He began the evaluation by stating that the purpose of the evaluation was to "determine money issues", review Thomson Senior's performance, explain why job descriptions were established and, what Tunze characterized as the "most important," to discuss their relationship. When Steve Tunze addressed Thomson Senior's production he said that it "*seems* to be slipping" and that his current assignment "*seems* to be taking longer than expected." (Emphasis added.) The latter comment was a reference to the current job that he was doing, which is referred to as MSD.

After the evaluation Thomson Senior's wage was reduced, but the reduction was to conform his wage with his job description, rather than as a result of disciplinary action (Tr. 193–194; Jt. Exh. 2 at 1b). Steve Tunze did not place Thomson Senior on probation, did not set any deadlines that had to be met or discharge would be forthcoming, nor in anyway say or indicate, that if improvement was not immediate, discharge would be imminent. Tunze ended the evaluation by saying that he continued to have confidence in Thomson Senior's ability, that he was a valued employee who was very much a part of the Respondent's plans, and that the Tunzes wanted him to remain employed by the Respondent. Notwithstanding Tunze's upbeat ending to the evaluation, Thomson Senior was so upset that he was off sick for the remainder of the day. He worked at the MSD site the following day. The next day, September 16, 1999, he spent the morning waiting for the Respondent's van to

be repaired. He was terminated at day's end when Steve Tunze told him "it just wasn't working out" (Tr. 193).

Tunze told the employees that Thomson Senior was discharged for poor productivity (Tr. 197). In protesting Thomson Senior's claim for unemployment benefits the Respondent added "unsatisfactory job performance" and stated that Thomson Senior was "displeased about change" (the change referred to was his wage reduction), and that he "caused discord among other employees" (GC Exh. 12). Kim Tunze, in her written response to the Board's investigation, added that Thomson Senior was a "very disgruntled employee" who was "going to affect the productivity and moral of all the other employees because of his display of negative actions" (Jt. Exh. 2 at 2).

Between Thomson Senior's evaluation and his discharge, the Tunzes learned that he was a prounion employee who would likely vote for the Union in an election. Employee Matt Stewart conveyed this information to the Tunzes on September 15, 1999. Steward told the Tunzes that he thought that five employees would vote for the Union. Stewart credibly testified that Kim Tunze wrote a list of the yes and no votes. In the yes column Stewart told her to list Thomson Senior and Junior, Jason Finnigan, Tom Baird, and Lisa Kicker. Stewart told her to record himself, Dave Crowder, Tom Tevlin, and Tom Homer in the no column. Thus, before Thomson Senior's discharge the potential vote was five to four for the Union. After his discharge the potential vote was tied, which would result in no union. Sometime after Stewart left, but on the same day, Kim Tunze contacted a labor lawyer. Within weeks of Thomson Senior's discharge the Respondent included in the employees pay envelope literature that, in essence, urged the employees to remain nonunion.

Section 8(a)(3) prohibits employer "discrimination [against employees] in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization." The methodology for determining discriminatory motivation is set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line,* the General Counsel has the initial burden to persuade that antiunion sentiment was a substantial or motivating factor in the employer's action. To sustain the burden, the General Counsel must show that the employee was engaged in protected activity, that the employer was aware of the activity, and that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial or direct evidence and is a factual issue, which the Board's expertise is peculiarly suited to determine. Proof of the protected activity, employer knowledge, and animus toward the activity supports an inference that the employee's protected conduct was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, supra at 1089. The employer may rebut the General Counsel's case by proving that animus played no part in its actions or, by establishing as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected conduct. The employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.

The Respondent admits that the General Counsel has met the initial burden. This admission has been acknowledged by the Board (GC Exhs. 1(n) and (m) at par. 14), is a fact established in the record, and which I find. As set forth above, the burden shifts to the Respondent to establish that it would have discharged Thomson Senior even in the absence of his protected conduct. To this end the Respondent presented its co-owners Steve and Kim Tunze, as witnesses. "The state of mind of the company officials who made the decision . . . reflects the company's motive for" the allegedly discriminatory action. *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 336 (5th Cir. 1980).

Kim Tunze testified at length but she did not have the testimonial demeanor of a candid and forthright witness. She was reluctant to give direct answers to even the most obvious questions. Thus, when asked her to confirm that the Respondent did not think that Thomson Senior was its best electrician, she answered that she did not think that she could give a yes or no answer and that she did not have an answer to the question. This response is regarding a person about whom she claims that there was a whole host of reasons that his pay was cut, and about whom she spends the majority of her testimony providing various reasons for his discharge (Tr. 101). One of the reasons given by the Respondent, as justification for Thomson Senior's discharge, is that he "caused discord among other employees." That reason was advanced, for the first time, to the Missouri Division of Employment Security when the Respondent was protesting Thomson Senior's unemployment benefits (GC Exh. 12). When Kim Tunze was asked to provide the name of even one employee who told her that Thomson Senior was causing discord, she was unable to do so (Tr. 115–117). Moreover, she admitted that she knew that Thomson Senior worked alone during the days after his evaluation and pay cut, and before his discharge (Tr. 106).

At one point in her testimony she seemed to almost place the responsibility for the discharge on the anonymous labor lawyer with whom she spoke immediately after employee Stewart told her that Thomson Senior would most likely vote for the Union. I find her testimony regarding her call to the labor lawyer to be especially disingenuous. In an attempt to explain why the Respondent did not discharge Thomson Senior on the day of his evaluation, but did so only 2 days after the evaluation, she volunteered that on March 15 she "talked to a labor lawyer in regard to the—what had happened." The following is her explanation of "what happened":

> As far as us firing him, and not any regards other than that. I mean, as far as us dropping his pay and his being disgruntled. He told me that you never, never, never, never, never, never lower someone's salary and put them back in the field. That's absolutely crazy. You should have fired him. And that is—I went on that direction (Tr. 114).

Kim Tunze's statements regarding the van incident also disclose that she was not reluctant to exaggerate events. Thus, she testified that Thomson Senior spent the entire day sitting in the repair shop (Tr. 115). Not only is this statement inconsistent

with the Respondent's records (R. Exh. 2), but with her husband's testimony (Tr. 192).

The van incident is one of the reasons given by Steve Tunze for discharging Thomson Senior. It was not a reason that was given to Thomson Senior. Tunze admitted that Thomson Senior was only told "it just wasn't working out." It was not given to the State Division of Employment Security (GC Exh. 12), nor was it given to the Board during its investigation (Jt. Exh 2). It was not given as a reason to the employees when Steve Tunze announced Thomson Senior's discharge (Tr. 197). It is of interest because, other than the Tunze's learning that there was an organizing campaign underway, and that Thomson Senior was one of the votes that the Union needed to prevail in an election, it is the only other specific event that happened during the 2 days between Thomson Senior's evaluation and his discharge.

The Tunze's statements indicate that this incident was an unusual occurrence. Kim Tunze stated that when the van needed repair someone would usually follow Thomson Senior to the repair shop and then take him on to his destination (Tr. 115). Steve Tunze stated that it was not normal procedure and "pretty much uncalled for to sit with your van for four hours and not tell anybody" (Tr. 189, 193). Shirley Bryan, the Respondent's secretary, states, however, that Thomson Senior would "sit nearly all day" waiting for the van to be fixed and that this happened "a number of times" (Tr. 89–90; GC Exh. 14). And yet Steve Tunze did not find those incidents of enough significance to mention them during his extensive evaluation of Thomson Senior. Indeed, the incident with the van was not told to the other employees, so as to serve as a warning, when he told them of Thomson Senior's discharge (Tr. 197). I find this reason a pretext, offered as an attempt to hide the real motive for Thomson Senior's discharge, which is the Respondent's belief that he supports the Union.

I also find that Steve Tunze's other reason for discharging Thomson Senior, his performance on the MSD job, to be a pretext. Tunze stated that Thomson Senior was taking days to finish work that should have taken hours (Tr. 188). That statement, when compared to what he told Thomson Senior during his evaluation regarding the MSD job—"*seems* to be taking longer than expected." (GC Exh. 8, emphasis added.)—is an extravagant exaggeration. It is doubtful that any employer, under normal circumstances, would retain an employee who was taking days to complete what should take hours, let alone praise him, tell him that he is very much a part of your plans, and that you want him to remain in your employ—which is what the Respondent admittedly told Thomson Senior, just days before it discharged him, which was immediately after it learned that he supported the Union.

I find that the Respondent did not rely on the various reasons it advanced for discharging Michael P. Thomson Sr. I find that those reasons were advanced only to disguise its real motive, which was to be rid of an employee whom it believed was a union supporter. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act.

3. The 8(a)(5) allegations

a. The unilateral changes

The unilateral change allegations are contained in paragraph 8 of the complaint. The Respondent admits the allegations, but states that "[u]nion representative Hepburn testified that the status quo was restored in regard to the alleged changes made in the Respondent's company policies" (R. Br. 10). Actually Hepburn testified that it was his belief that some of the changes had been restored. Regardless, the Respondent's statement is neither a valid defense to the allegation, nor an appropriate remedy.

I find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the existing terms and conditions of the unit employees employment, including their wages, sick days, vacation days, holidays, insurance, and the use of cellular telephones, without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the changes and the effects of the changes.

b. The information requests

(1) The March 21, 2000 request

The Respondent does not deny that on March 21, 2000, the Union made a valid, presumptively relevant request for weekly payroll records. The Respondent contends that the requested records were available from the Department of Labor. This fact does not alter or diminish the Respondent's obligation to furnish the relevant information. *Holyoke Water Power Co.*, 273 NLRB 1369 (1985).

I find that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to provide all certified weekly payroll records for St. Louis Community Colleges, Meramac Community College, Florissant Valley Community College, and Forest Park Community College.

(2) The April 5, 2000 request

The Union made a presumptively relevant request for the names, addresses, and telephone numbers of all the strike replacement employees. Strike replacement employees are unit, if not union, members and as such are represented by the Union for purpose of collective bargaining. Union Representative Hepburn credibly testified that the Union, as the certified collective-bargaining representative for the unit employees, needs to contact those employees to ascertain the goals they wish to achieve as a result of negotiations. Hepburn credibly testified that the Union had no way of knowing who those unit employees were or how they could be contacted. Hepburn opined that bargaining, without knowing the wishes of all the unit members, would not be fruitful. Respondent may withhold the requested information if it can establish that there is a clear and present danger that the information would be misused by the Union. The Respondent has not established that there is any danger that the information would be misused by the Union.

The Respondent does contend, both as a defense to this information request, and as part of a generic argument, that the circumstances of this case demonstrate "that it was the Union's

goal not to seek a collective bargaining agreement with this employer, but rather to put the Respondent out of business." The Respondent cites no case law to support this position and the record evidence does not establish the claim. Accordingly, I find that the Respondent has failed and refused to provide the requested names, addresses, and telephone numbers of strike replacement employees in violation of Section 8(a)(5) and (1) of the Act. *Page Litho, Inc.*, 311 NLRB 881, 882 (1993).

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of the Respondent are an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All journeymen and apprentice electricians employed by Respondent from its St. Charles, Missouri facility, excluding all office clerical and professional employees, guards and supervisors as defined in the Act.

4. The Union, since February 28, 2000, has been and is, the exclusive representative of the employees in the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. By interrogating its employees about their union activities and sympathies, by threatening employees with unspecified reprisals because of their union activities and sympathies, by suggesting that employees should quit because of their union activities and sympathies, the Respondent has violated Section 8(a)(1) of the Act.
6. By discharging employee Michael P. Thomson because the Respondent believed that he joined the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.
7. By unilaterally, and without prior notice to the Union and without affording the Union an opportunity to bargain, changing the terms and conditions of employment of unit employees including their wages, sick days, vacations days, holidays, insurance, and the use of cellular telephones, since on or about March 9, 2000, the Respondent has violated Section 8(a)(5) and (1) of the Act.
8. By failing and refusing, since March 21, 2000, to provide the Union with relevant, requested information, specifically all certified weekly payroll records for St. Louis Community Colleges, Meramac Community College, Florissant Valley Community College, and Forest Park Community College the Respondent has violated Section 8(a)(5) and (1) of the Act.
9. By failing and refusing, since April 5, 2000, to provide the Union with relevant, requested information, specifically the names, addresses, and telephone numbers of all strike replacement employees the Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Board, in rejecting the parties' stipulation of facts, noted that although the parties stipulated that employee Michael P. Thomson had rejected an offer of reinstatement from the Respondent, they had not stipulated that the offer was a valid offer of reinstatement. No evidence concerning the offer was presented at the hearing. I will order the standard reinstatement and make whole remedy to the extent that it has not been done. If the validity of the offer becomes an issue, it is best resolved in the compliance phase of this proceeding. The Respondent having discriminatorily discharged employee Michael P. Thomson, it must, to the extent that it has not already done so, offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is also ordered that the Respondent, on the request of the Union, rescind any changes in the terms and conditions of employment of the unit employees that it implemented on March 9, 2000. To the extent that unit employees suffered economic detriment as a consequence of the Respondent's unlawful unilateral changes the Respondent is required to make them whole, plus interest as computed in *New Horizons for the Retarded*, supra.

The General Counsel has requested that the certification year be extended for 1 year from the date that the Respondent provides the Union with names, addresses, and telephone numbers of the strike replacement employees in the unit. The Board has long held that where an employer has, during part or all of the year immediately following a certification, refused to bargain with, or to provide relevant information for bargaining to the Union, the Board will take measures to assure a period of at least a year of good-faith bargaining during which the bargaining representative need not fend off claims that it has lost its majority support. *Michigan Rent-to-Own*, 286 NLRB 1415 (1987); *Mar–Jac Poultry Co.*, 136 NLRB 785 (1962). The measures taken by the Board to assure a period of at least a year of good-faith bargaining usually, but not always, include an extension of the certification year. E.g., *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985). The length of the extension of the certification year, when it is ordered, is not necessarily a simple arithmetic calculation. E.g., *Colfor Inc.*, 282 NLRB 1173 (1987).

The factors which the Board considers in determining the length that the certification year should be extended include the nature of the violations, the number, extent, and dates of the collective-bargaining sessions, the impact of the unfair labor practices on the bargaining process and the conduct of the Union during the negotiations. *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 617 (1996).

I have evaluated the factors and find that a 1-year extension of the certification year, which will commence on the date that the Respondent provides the Union with the names, addresses, and telephone numbers of all strike replacement employees, is appropriate. The Union was certified on February 28, 2000. I

have found that Butch Hepburn, the Union business agent, credibly testified that on March 9 he requested dates and times from the Respondent, and its attorney, as to when they would be available for bargaining. It was also on March 9 that the Respondent announced, and implemented, extensive unilateral changes to the unit employees' existing terms and conditions of employment, thus beginning its "circumvention of the duty to negotiate which frustrates the objective of § 8(a)(5)" *NLRB v. Benne Katz*, 369 NLRB 736, 743 (1962). Thereafter the parties met only twice for a total of only, at most, 3-1/2 hours. Save for the Respondent's pro forma delivery of a contact, the entire time was spent discussing the Union's patently relevant information requests. The Respondent unlawfully failed and refused to provide the information in either request. The last request dated April 10 asked for the names, addresses, and telephone numbers of all strike replacement employees, without which the Union has no way of contacting the unit employees, and thus, is precluded from fully formulating its demands. Thus, except for the period from February 28 until March 9, a period that I find that the bargaining process never had a chance to get seriously and fairly underway, the entire time is directly attributable to the Respondent's unlawful acts. *D. J. Electrical Contracting, Inc.*, 303 NLRB 820 fn. 2 (1991). Accordingly, I find it appropriate to extend the certification year for a 1-year period beginning from the date that the Respondent provides the Union with names, addresses, and telephone numbers of the strike replacement employees in the unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, JHP & Associates, LLC d/b/a Metta Electric St. Charles, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities and sympathies.

(b) Threatening employees with unspecified reprisals because of their union activities and sympathies.

(c) Suggesting that employees should quit because of their union activities and sympathies.

(d) Discharging or otherwise discriminating against employees for supporting Local No. 1, International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

(e) Unilaterally, and without prior notice to the Union and without affording the Union an opportunity to bargain, changing the terms and conditions of employment of unit employees including their wages, sick days, vacation days, holidays, insurance, and the use of cellular telephones.

(f) Failing to provide requested information that is relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employee Michael P. Thomson, to the extent that it has not already done so, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make employee Michael P. Thomson whole, to the extent that it has not already done so, for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files, to the extent that it has not already done so, any reference to the unlawful discharge, and within 3 days thereafter notify employee Michael P. Thomson in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days from the date of this Order rescind, on the request of the Union, any changes in the terms and conditions of employment of unit employees that it implemented on March 9, 2000.

(e) To the extent that unit employees suffered economic detriment as a consequence of our unlawful unilateral changes we will make them whole, plus interest.

(f) Provide the Union with the relevant information it requested on March 21, 2000, specifically all certified weekly payroll records for St. Louis Community Colleges, Meramac Community College, Florissant Valley Community College, and Forest Park Community College.

(g) Provide the Union with the relevant information it requested on April 5, 2000, specifically the names, addresses, and telephone numbers of all strike replacement employees.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in St. Charles, Missouri, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 16,1999.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate employees about their union activities and sympathies.

WE WILL NOT threaten employees with unspecified reprisals because of their union activities and sympathies.

WE WILL NOT suggest that employees should quit because of their union activities and sympathies.

WE WILL NOT discharge or otherwise discriminate against employees for supporting Local No. 1, International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

WE WILL NOT unilaterally, and without prior notice to the Union and without affording the Union an opportunity to bargain, change the terms and conditions of employment of unit employees including their wages, sick days, vacation days, holidays, insurance, and the use of cellular telephones.

WE WILL NOT fail to provide requested information that is relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer employee Michael P. Thomson, to the extent that we have not already done so, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make employee Michael P. Thomson, to the extent that we have not already done so, whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files to the extent that we have not already done so, any reference to the unlawful discharge of employee Michael P. Thomson, and WE WILL, within 3 days thereafter, to the extent that we have not already done so, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL within 14 days from the date of the Board's Order rescind, on the request of the Union, any changes in the terms and conditions of employment of unit employees that were implemented on March 9, 2000.

WE WILL make unit employees whole plus interest to the extent that they suffered economic detriment as a consequence of our unlawful unilateral changes.

WE WILL provide to the Union the information it requested that is relevant to the performance of its duties as the exclusive collective-bargaining representative of the employees in the appropriate unit.

JHP & ASSOCIATES, LLC D/B/A METTA ELECTRIC